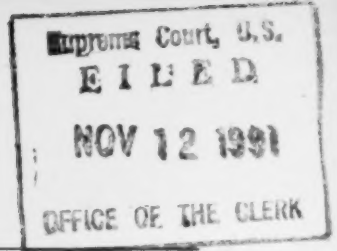


(3)  
No. 91-632



In The  
**Supreme Court of the United States**  
October Term, 1991

\_\_\_\_ ◆ \_\_\_\_\_  
LOIS MILLSPAUGH and TINA DYSON,  
*Petitioners,*

v.

COUNTY DEPARTMENT OF PUBLIC WELFARE  
OF WABASH COUNTY, et al.,  
*Respondents.*

\_\_\_\_ ◆ \_\_\_\_\_  
Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

\_\_\_\_ ◆ \_\_\_\_\_  
**BRIEF OF RESPONDENT IN OPPOSITION**

Robert J. Palmer  
*(Counsel of Record)*  
May, Oberfell & Lorber  
300 North Michigan  
South Bend, IN 46601  
(219) 232-2031

*Counsel for Respondent*  
County Department of Public Welfare  
of Wabash County

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## **RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

Respondent, County Department of Public Welfare of Wabash County, respectfully disagrees with petitioners' statement of the questions presented for review. The following is submitted as a more accurate statement of the questions presented with respect to the County Department of Public Welfare of Wabash County.

Whether Millspaugh and Dyson have sustained their burden of establishing a genuine issue of material fact regarding the existence of an unconstitutional policy, procedure, custom, or practice of the Wabash County Department of Public Welfare.

Whether Millspaugh and Dyson have failed to establish a genuine issue of material fact regarding whether any action taken by the social worker and director was a cause of their alleged constitutional deprivations.

Whether Millspaugh and Dyson failed to preserve any error with regard to the District Court's entry of summary judgment.

## **PARTIES TO THE PROCEEDINGS**

The following parties were involved in the underlying proceedings:

Lois Millspaugh (petitioner)

Tina Dyson (petitioner)

County Department of Public Welfare of  
Wabash County (respondent)

Manetta Tucker (respondent)

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Respondent, County Department of Public Welfare of Wabash County (hereinafter referred to as "DPW"), respectfully requests this Court to deny the pending petition for writ of certiorari in which petitioners are seeking review of the opinion issued by the United States Court of Appeals for the Seventh Circuit. The opinion of the Court of Appeals is set forth verbatim by petitioners in the appendix to petitioners' petition for writ of certiorari filed herein (Appendix at pp. 2-21). DPW accepts the sections of Millspaugh and Dyson's petition entitled Opinions Below (petition at p. 6), and Jurisdictional Grounds (petition at p. 6).

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**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

DPW does not accept Millspaugh and Dyson's statement of constitutional and statutory provisions involved. The issues raised with respect to DPW do not involve any constitutional or statutory provisions. DPW was granted a summary judgment in this case due to petitioners' failure to sustain their burden of establishing a genuine issue of material fact with respect to either the existence of an unconstitutional policy, procedure, custom



or practice of the DPW or causation between any actions taken by the social worker and the director and the alleged constitutional deprivations. Additionally, petitioners failed to establish any constitutional deprivation resulting from the actions of the social worker, the director or the DPW.

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### STATEMENT OF THE CASE

DPW does not accept petitioners' statement of the case as being complete and accurate. Therefore, the DPW offers the following supplement to the statement of the case for the Court's consideration:

The Indiana Department of Public Welfare established a manual for child welfare/social services which was released to county welfare departments effective September 30, 1983. The policies and procedures contained in the manual were in effect during the year 1984. The policies and procedures for the handling of CHINS (Children in Need of Services) cases are set forth in the manual. In addition to the policies set forth in the manual, the Indiana Department of Public Welfare also promulgates policies and procedures for the county departments of public welfare through regulations published in the Indiana

Administrative Code and informal directives such as letters and bulletins.

The Wabash County Department of Public Welfare used the manual as its own policies and procedures for the handling of CHINS cases in 1984 and all years thereafter. The manual contains references to various state statutes as a legislative basis for the policies set forth therein. In 1984 and all years thereafter, the DPW expected and instructed its case workers and employees to follow the procedures published by the Indiana Department of Public Welfare with respect to the handling of CHINS cases. Likewise, the DPW expected and required its employees and case workers to comply with the state statutes governing CHINS cases. In 1984 and all years thereafter, the DPW employed an attorney, Stephen H. Downs, to guide and assist its employees and case workers in complying with the laws and state procedures for handling CHINS cases. It is not, and was not, the policy of the DPW to establish any policies or procedures contrary to, or inconsistent with, the policies and procedures set by the state for dealing with CHINS cases.

The District Court granted summary judgment in favor of the DPW on several grounds. The Court first noted that there was no evidence to suggest that the DPW

failed to follow the proper procedures in its conduct of the investigations and institution of proceedings. The court concluded that, to the contrary, the evidence suggested that the investigation was conducted as best as practicable under the circumstances. The District Court also concluded that Millspaugh and Dyson failed to establish a genuine issue of material fact regarding the existence of an unconstitutional policy, procedure, custom or practice of DPW. Finally, the District Court ruled that Millspaugh and Dyson had failed to demonstrate any causal connection between the DPW's policies and any alleged constitutional deprivations.

The Seventh Circuit Court of Appeals affirmed the District Court's summary judgment in favor of the DPW. The Court of Appeals agreed that Millspaugh and Dyson failed to identify an unconstitutional policy of the DPW and failed to show how the application of such an unconstitutional policy caused their injury.

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## **SUMMARY OF THE ARGUMENT**

### **Policy, Procedure, Custom or Practice**

The uncontroverted evidence establishes that the policies and procedures of the Wabash County Department

of Public Welfare are established by legislative enactments, administrative regulations and a manual issued by the Indiana Department of Public Welfare. The DPW's actions with respect to a CHINS hearing are completely circumscribed by the statutory and regulatory scheme. Millspaugh and Dyson have failed to sustain their burden of establishing that any deviation from the official policies and procedures constituted a policy, custom or practice of the DPW.

### Causation

Causation is an essential element of a § 1983 cause of action. The District Court correctly ruled that Millspaugh and Dyson failed to establish a causal connection between any action of the DPW and their alleged constitutional deprivations.

### Waiver

Millspaugh and Dyson have failed to preserve any errors with respect to the District Court's entry of summary judgment. The brief filed with the Seventh Circuit Court of Appeals failed to specifically challenge any portion of the District Court's memorandum and order. Additionally, Millspaugh and Dyson failed to challenge the District Court's ruling with regard to causation in the direct appeal to the Court of Appeals.

## ARGUMENT

### I.

**THE PETITION SHOULD BE DENIED BECAUSE THE ONLY ISSUE RAISED WITH RESPECT TO THE DPW IS WHETHER BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN RULING THAT MILLSPAUGH AND DYSON FAILED TO SUSTAIN THEIR BURDEN OF PROOF IN OPPOSING A MOTION FOR SUMMARY JUDGMENT.**

Rule 10 of the Rules of the Supreme Court of the United States provides that a petition for writ of certiorari will be granted "only when there are special and important reasons therefor." There are no special or important reasons for granting the petition in the case now before this Court. The petition does not challenge the constitutionality of any statute or regulation of the DPW. Furthermore, the issues raised with respect to the DPW do not involve conflicting opinions between the Seventh Circuit Court of Appeals and another circuit court of appeals. The issue raised with respect to the DPW involves only the question of whether petitioners sustained their burden of establishing a genuine issue of material fact in opposing a motion for summary judgment. There is no dispute between the parties as to the applicable law, nor do petitioners

challenge the Court of Appeals' statement of the applicable law with respect to the judgment entered in favor of DPW.

## II.

**THE PETITION SHOULD BE DENIED  
BECAUSE MILLSPAUGH AND DYSON  
HAVE FAILED TO SUSTAIN THEIR  
BURDEN OF ESTABLISHING A  
GENUINE ISSUE OF MATERIAL FACT  
REGARDING THE EXISTENCE OF AN  
UNCONSTITUTIONAL POLICY,  
PROCEDURE, CUSTOM OR  
PRACTICE OF THE WABASH  
COUNTY DEPARTMENT OF PUBLIC  
WELFARE.**

The uncontroverted evidence before the District Court established that the Indiana Department of Public Welfare established a manual for child welfare/social services which was released to county welfare departments effective September 30, 1983. The policies and procedures contained in the manual were in effect during the year 1984. The policies and procedures for the handling of CHINS cases are set forth in the manual. In addition to the policies and procedures set forth in the manual, the Indiana Department of Public Welfare also promulgates policies and procedures for the county departments of public welfare through regulations published in the Indiana

Administrative Code and informal directives such as letters and bulletins.

The Wabash County Department of Public Welfare used the manual as its own policies and procedures for the handling of CHINS cases in 1984 and all years thereafter. The manual contains references to various state statutes as a legislative basis for the policies set forth therein. In 1984 and all years thereafter, the DPW expected and instructed its case workers and employees to follow the procedures published by the Indiana Department of Public Welfare for handling CHINS cases. Likewise, the DPW expected and required its employees and case workers to comply with the state statutes governing CHINS cases. In 1984 and all years thereafter, the DPW employed an attorney, Stephen H. Downs, to guide and assist its employees and case workers in complying with the laws and state procedures for handling CHINS cases. It is not, and was not, the policy of the DPW to establish any policies or procedures contrary to, or inconsistent with, the policies set by the state for dealing with CHINS cases.

Millspaugh and Dyson are not challenging the constitutionality of any of the legislative enactments or promulgated regulations. Millspaugh and Dyson contend only that the departure from the established policies and

procedures by Tucker and Judy Mason, Tucker's supervisor, deprived Millspaugh and Dyson of their constitutional rights. Millspaugh and Dyson's claims are based solely upon alleged deviations from the statutory and administrative policies and procedures.

It is now beyond dispute that a government agency is not liable under 42 U.S.C. § 1983 on the theory of *respondeat superior*. In order to establish governmental liability, Millspaugh and Dyson must allege and prove that the alleged deprivations of their constitutional rights were caused by a formal policy, procedure, custom or practice of the governmental agency. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978); *Gray v. Dane County*, 854 F.2d 179 (7th Cir. 1988); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) *cert. den.* 489 U.S. 1065 (1989); *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986).

In light of Millspaugh and Dyson's failure to challenge the constitutionality of any of the statutory or administrative policies and procedures of the DPW, the issue in this case is whether any deviation from the official policies or procedures constitutes a sufficient custom or practice to establish liability on behalf of the DPW. It is respectfully submitted to the Court that due to the tightly



circumscribed nature of a county department's discretion, a deviation from the official policy or procedure is random and unauthorized and therefore not a policy, procedure, custom or practice of the DPW itself.

Millspaugh and Dyson concede that their claims against the DPW are based solely upon the DPW director's personal involvement in the investigation and decision to remove the children and her continued review and approval of Tucker's actions. Millspaugh and Dyson contend that an Indiana statute, I.C. 12-1-4-1, which provided that the county director possessed and exercised any of the rights, power or duties imposed or conferred on the county department establishes that the actions of a department director are sufficient to establish the official policy or procedure for the DPW. A review of the relevant case law, however, establishes that Millspaugh and Dyson's argument is without merit.

The DPW does not dispute the fact that even a single decision taken by a governmental official with policymaking authority may give rise to liability under § 1983. However, it is clear that not every act of a policymaking official gives rise to liability on behalf of the governmental agency. This Court clarified the type of decision which would give rise to liability in *Pembaur v.*

*City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986). In ruling that liability could attach only where a deliberate choice to follow a course of action is made from among various alternatives by an official responsible for establishing the final policy, the Court cautioned that not every decision of a policymaking official gives rise to municipal liability based on the exercise of the official's discretion.

In the case now before this Court, although I.C. 12-1-4-1 provided that rights, power or duty imposed or conferred on the DPW shall be possessed and exercised by the county director, those rights, powers and duties are completely circumscribed by the formalized policy and procedure set forth in the applicable statutes, regulations and manuals. The statute merely provided the director the rights, power and duties to enforce the officially enacted policies and procedures.

The evidence is uncontroverted that the manual issued by the Indiana Department of Public Welfare pursuant to its responsibility to supervise the child welfare programs administered by county departments was used by the DPW as its own policies and procedures. Indiana Code 12-1-4-1 does not give the director of a county department of public welfare carte blanche to reject and deviate from

the official policies and procedures set forth in the applicable statutes, regulations and manuals. In this respect, the director of a county department of public welfare does not have any alternatives from which to choose regarding policy decisions. Those decisions have been made and formalized by the enactment of the statutes and regulations and the use of the manuals.

Recent case law establishes that a governmental agency is not liable under § 1983 for unlawful deviations from official policies and procedures even if those deviations were made by a person with policymaking authority. Specifically, the Seventh Circuit Court of Appeals rejected such an argument in *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) *cert. den.* \_\_\_ U.S. \_\_\_, 111 S. Ct. 783 (1991), in situations in which, although an official has the authority and discretion to effect deprivation of constitutional rights, that discretion is "circumscribed" by statutory or other predeprivation procedural safeguards. In an *en banc* decision rendered specifically in light of this Court's ruling in *Zinerman v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L.Ed.2d 100 (1990), the Court of Appeals ruled that in such a situation, the state official's abuse of discretion was not predictable and was therefore random and unauthorized. The governmental agency is not liable,

pursuant to § 1983, for such random and unauthorized actions.

The Seventh Circuit Court of Appeals also discussed in detail the relationship between the circumscribed discretion of a policymaking official and the random and unauthorized deviation from policy. The Court of Appeals ruled that where formal policies and procedures are set in place, a deviation does not establish a new policy or procedure. *Easter House v. Felder*, *supra*, 910 F.2d at 1402-1403.

In the case now before this Court, Millspaugh and Dyson request the Court to ignore the formal statutes and regulations and to rule that, despite the formal policies and procedures, any deviations established the policy, custom and practice of the Department to be applied in the case. It is uncontroverted, however, that the state formalized its policies and procedures through in-depth statutes and regulations. The rights, power and duties under the statutes and regulations are delegated to the county departments of public welfare and the county director. The county departments and director, however, have no authority to make policy in contravention of the formal state policies or to even deviate from the formal state policies. Therefore, the single incident involving the Millspaugh and Dyson

children cannot constitute a policy, procedure, custom or practice. In light of the fact that Millspaugh and Dyson have come forth with absolutely no evidence to establish that there have been any repeated deviations from the formally established policy and procedure, the trial court properly determined that any deviation by Tucker or Mason did not constitute a policy, procedure, custom or practice of the Wabash County Department of Public Welfare.

### III.

**THE PETITION SHOULD BE DENIED  
BECAUSE MILLSPAUGH AND DYSON  
HAVE FAILED TO ESTABLISH A  
GENUINE ISSUE OF FACT  
REGARDING WHETHER ANY  
ACTION TAKEN BY THE SOCIAL  
WORKER AND THE DIRECTOR WAS  
A CAUSE OF THEIR ALLEGED  
CONSTITUTIONAL DEPRIVATIONS.**

It is well established that in order to prevail in a § 1983 action, a plaintiff must establish a causal connection between the alleged denial of due process and any injury suffered. In this regard, the principles of tort causation apply to constitutional torts as well as to other tort suits. *Lossman v. Pekarske*, 707 F.2d 288 (7th Cir. 1983). See generally, *Mazanec v. North Judson-San Pierre School Corp.*, 798 F.2d 230 (7th Cir. 1986); *Muckway v. Craft*,

789 F.2d 517 (7th Cir. 1986). The District Court properly found that Millspaugh and Dyson did not demonstrate a causal connection between inadequate service and their alleged deprivations.

The uncontroverted evidence establishes that Millspaugh and Dyson had actual notice of the hearings involving their children. Despite such notice, they purposely chose not to attend the hearings and submit evidence. The evidence further establishes that once Millspaugh and Dyson retained an attorney who attended the hearings on their behalf, the children were returned to their mothers. Any injury alleged by Millspaugh and Dyson is therefore not a result of inadequate service, but rather, their own failure to attend the hearings.

The District Court also correctly determined that many of the actions which Millspaugh and Dyson challenge as unconstitutional cannot be attributed to the DPW. Specifically, Millspaugh and Dyson do not challenge the District Court's finding that it was the officer who detained the children who was charged with the responsibility of providing notice of post-deprivation hearings to Millspaugh and Dyson. Assuming *arguendo* that the officer did not fulfill his responsibility of providing notice, it was not the action of the DPW which prevented the officer from

providing proper notice. Similarly, the failure of a police officer to give proper notice is not in accordance with the policy and procedures dictated by the statutes and regulations governing the DPW.

Millspaugh and Dyson also fail to challenge the District Court's finding that the scheduling of the CHINS proceedings and subsequent notice of the rescheduling of the proceedings are matters within the discretion of the state trial court, not the DPW. Millspaugh and Dyson, therefore, have failed to establish that any problems in the scheduling of the proceedings, or subsequent notice, were attributable to the DPW.

In summary, Millspaugh and Dyson have failed to sustain their burden of establishing any action taken by the DPW which caused any injury to them. On the contrary, the uncontroverted evidence establishes that any injury was caused not only by the actions of people outside the DPW, but also by Millspaugh and Dyson themselves. In light of the uncontroverted evidence, the District Court committed no error in entering summary judgment in favor of the DPW.

#### IV.

#### **THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS FAILED TO PROPERLY PRESERVE ANY ERROR IN THEIR DIRECT APPEAL TO THE COURT OF APPEALS.**

The District Court judge, in accordance with Rule 50 of the Rules of the Seventh Circuit Court of Appeals, stated his reasons for granting summary judgment in a written statement. Millspaugh and Dyson did not specifically challenge any of the trial court's findings, conclusions or reasoning in their appeal to the Seventh Circuit Court of Appeals. Instead, Millspaugh and Dyson essentially relied upon the memorandum they filed in opposition to the motions for summary judgment in the District Court. The Seventh Circuit Court of Appeals has previously ruled that a party complaining of error in the findings of a trial court must demonstrate the error with something more than general assertions. In *George E. Hoffman & Sons, Inc. v. International Brotherhood of Teamsters*, 617 F.2d 1234 (7th Cir. 1980) *cert. den.* 449 U.S. 937 (1980), the Court of Appeals stated that a reviewing court will not make its own search of the record to determine whether such general assertions of error are supportable.

In light of Millspaugh and Dyson's failure to specifically challenge any portion of the District Court's memo-



random and order, they essentially requested the Court of Appeals to search the record in an attempt to find error. Such action fails to preserve any error in the Court of Appeals.

Similarly, Millspaugh and Dyson have waived any issue with respect to the causation of their alleged damages. The District Court, in its memorandum and order, noted that the DPW argued in its motion for summary judgment that Millspaugh and Dyson had failed to demonstrate causation of any constitutional or civil rights injury in light of their failure to appear at proceedings concerning the children and that any right to be heard was waived by their failure to appear. The District Court noted that Millspaugh and Dyson "make no specific response to these assertions."

The District Court also ruled that Millspaugh and Dyson failed to demonstrate any damage resulting from the failure to serve process because the record indicated Millspaugh and Dyson had actual knowledge of the proceedings. The District Court noted that Millspaugh and Dyson did not demonstrate a causal connection between inadequate service and their alleged deprivations.

Millspaugh and Dyson failed to address the causation issues in their direct appeal to the Court of Appeals.

Their statement of the issues did not support any alleged error with regard to the District Court's ruling that Millspaugh and Dyson failed to establish causation. Similarly, the argument section of the brief in the Court of Appeals did not include any contention that the District Court erred in its ruling regarding causation.

Rule 28 of the Federal Rules of Appellate Procedure requires the appellant to set forth a statement of the issues presented for review together with an argument that contains the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record upon which the appellant relies. The Seventh Circuit Court of Appeals has ruled that an appellant's failure to set forth the issues or argument as required by Rule 28 results in a waiver of any issues not presented. *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir. 1989); *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1989); *Bonds v. Coca-Cola Company*, 806 F.2d 1324 (7th Cir. 1986).

It is well settled that a plaintiff in a § 1983 action must allege and establish causation as an element of the cause of action. *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986); *Garza v. Henderson*, 779 F.2d 390 (7th Cir. 1985).

Since Millspaugh and Dyson did not challenge the trial court's ruling that they failed to establish the requisite causation, they waived the issue. This waiver would have justified the affirmance of the District Court's order by the Court of Appeals.

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### CONCLUSION

The issues raised with respect to the DPW do not support a grant of the petition for writ of certiorari. Contrary to the broad constitutional allegations contained in the petition, the District Court and the Seventh Circuit Court of Appeals, decided this case on the procedural grounds contained in Federal Rule of Civil Procedure, Rule 56. Pursuant to Rule 56, the trial court's entry of summary judgment can be sustained on three separate and distinct grounds. First, Millspaugh and Dyson have failed to establish any constitutional violation. Second, Millspaugh and Dyson have failed to create a genuine issue of material fact with regard to any policy or procedure of the DPW which led to a constitutional deprivation. Finally, Millspaugh and Dyson have failed to establish that any policy or procedure of the DPW caused a constitutional deprivation.

tion. The Court of Appeals correctly ruled that Millspaugh and Dyson failed to identify an unconstitutional policy or to show how an unconstitutional policy caused their injury.

WHEREFORE, respondent, the County Department of Public Welfare of Wabash County, respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

Robert J. Palmer  
*(Counsel of Record)*  
May, Oberfell & Lorber  
300 North Michigan  
South Bend, IN 46601  
(219) 232-2031

*Counsel for Respondent*  
County Department of Public Welfare  
of Wabash County